Supreme Court, U.S.
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No. 95 20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

SYLVIA C. CIMERMANCIC,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the
Texas Court of Appeals
For the Thirteenth District

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June 30, 1995

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ISSUE PRESENTED

Because of the certainty Petitioner has been stigmatized by the conviction herein, the Texas Court of Appeals below deprived Petitioner of due process and justice under the law in violation of the Fourteenth Amendment to the U.S. Constitution, when before affirming Petitioner's conviction as charged in the trial court, for which the supporting evidence still is insufficient and totally devoid of record support, that Court of Appeals, to match the proof at trial, amended and effectively rewrote the State's charging instrument; but without this ex post facto judicial appellate amendment, the trial evidence is insufficient beyond a reasonable doubt to convict Petitioner of every essential statutorily requisite fact of "the charged crime" of which before the contested trial Petitioner had received notice of in the information, the State's only trial pleading.

LIST OF ALL PARTIES BELOW

The original parties before the Texas Court of Appeals for the Thirteenth District were the State of Texas and Petitioner Sylvia Carrancho Cimermancic.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioner's undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Sylvia Carrancho Cimermancic was represented at trial and on appeal by criminal defense attorney Joseph A. Connors III of McAllen, Texas.

TABLE OF CONTENTS

ISSUE PRESENTED i

LIST OF ALL PARTIES BELOW ii

STATEMENT OF RELATED CASES AND PROCEEDINGS ii

IDENTITY OF DEFENSE COUNSEL BELOW ii

TABLE OF CONTENTS iii

LIST OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS . . . 2

REASONS FOR REVIEW 2

STATEMENT OF THE CASE 5

ISSUE IN BRIEF 8

ARGUMENT 9

I. The trial court erred in convicting Petitioner as charged and the Court of Appeals erred in affirming that conviction which is not supported by "proof beyond a reasonable doubt."

ARGUMENT 14

II. The Texas Court of Appeals reversibly erred in applying legislative branch's rules of statutory construction to construe the State executive branch's grammar choice in the prosecutor's pleading.

CONCLUSION 18

LIST OF AUTHORITIES

CASES

Page

Cimermancic v. State (No. 13-93-00291-CR Tex.App.—Corpus Christi decided 12/22/94) 1

Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) 3, 11, 16

Dunn v. U.S., 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) 4, 16

Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981) . . . 9

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 3, 9, 12

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 3, 9-10

Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) . 5, 15

Thompson v. City of Louisville,
362 U.S. 199, 80 S.Ct. 624,
4 L.Ed.2d 654 (1960) 4, 13

RULES AND STATUTES

28 U.S.C.
Section 1257(3) 1
Section 2254 4

V.T.C.A. Penal Code
Section 1.05 14
Section 46.02(a) 10, 14

Supreme Court Rule 13.1 1

CONSTITUTIONS

14th Amendment . 2, 5, 7, 9, 11-12, 15-16, 18

OPINION BELOW

The opinion of the Court of Appeals (Pet.App. 1-4) is unreported. Cimermancic v. State (No. 13-93-00291-CR Tex.App.—Corpus Christi decided 12/22/94).

JURISDICTION

The Texas Court of Appeals for the thirteenth judicial district entered its judgment and opinion on December 22, 1994 (Pet.App. 1-6). On February 2, 1995, that Court of Appeals overruled Petitioner's timely filed motion for rehearing en banc. On February 6, 1995, Petitioner timely mailed for filing her petition for discretionary review. In its cause no. 0277-95, the Texas Court of Criminal Appeals refused Petitioner's petition for discretionary review on May 3, 1995. Within the next 90 days, Petitioner timely mailed this petition for writ of certiorari for filing by the Clerk of this Court. Supreme Court Rule 13.1. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING REVIEW

Federal constitutional due process demands reversal of the Court of Appeals' judgment and opinion because with uncontradicted evidence showing Petitioner is a female (Pet.App. 2), the State failed to prove its trial allegation that "on and about his person" Petitioner unlawfully carried a handgun (Pet.App. 7).

The Texas Court of Appeals rendered a decision in violation of the due process guaranteed Petitioner by the Fourteenth Amendment to the U.S. Constitution by on a

charge neither made nor tried affirming the trial court's judgment although the State's pleadings were not all supported by "proof beyond a reasonable doubt."

The Texas Court of Appeals has decided a federal question in a way that conflicts with:

1. Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644 (1948), which held that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process.
2. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970), which held "... that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."
3. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2791-93, 61 L.Ed.2d 560 (1979), which held that in a challenge to

a state criminal conviction under 28 U.S.C. §2254, the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt of every essential fact or element of the offense charged.

4. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), which secures to an accused the freedom from a wholly arbitrary deprivation of liberty and held that a conviction based on a record wholly devoid of any relevant evidence at all of a crucial element of the offense charged is constitutionally infirm.

5. Dunn v. U.S., 442 U.S. 100, 106-107, 99 S.Ct. 2190, 2194, 60 L.Ed.2d 743 (1979), which held that for the Court of Appeals to uphold a conviction on a charge that was neither alleged in the indictment nor

presented to the factfinder at trial offends the most basic notions of due process, for the defendant has the right to be heard on the specific charges of which he is accused.

6. Stirone v. U.S., 361 U.S. 212, 219, 80 S.Ct. 270, 274, 4 L.Ed.2d 252 (1960), which held it is fatal error if the defendant was convicted on a charge the charging instrument never made against him.

STATEMENT OF THE CASE

This Court has jurisdiction to review the judgment below by a writ of certiorari.

On May 25, 1993, after a contested bench trial on the information (Pet.App. 7), the trial court orally assessed punishment at a fine of $300.00 after finding Petitioner "guilty of unlawful possession of a handgun" (1R 608; 2R 157-158) (see Pet.App. 8-10). In the trial court at the close of the State's case-in-chief, Petitioner's counsel unsuccessfully moved for a

not guilty in the following colloquy (2R 101-102):

MR. CONNORS: 7107, could you open that up to where ever the information is? I wanted to make a motion.

THE COURT: All right. I am ready.

MR. CONNORS: If you will read the last line of that with me or the last two lines, it says, "Intentionally and knowingly carry on or about his person a weapon, to-wit: handgun."

You may have wondered why I was asking about swimsuits at the Island, but you heard Mr. Abel testify my client is not a man, yet the State said she was and they were going to prove it beyond a reasonable doubt, and we have in evidence only that she is a female, and therefore the defendant is entitled to another not guilty verdict, it seems to me, on a small technicality, but it is something the State said they would prove beyond a reasonable doubt, and they can't do it.

I have got her birth certificate here from downstairs if you want that, the evidence that she is a female.

THE COURT: Denied on those grounds. I did wonder why you asked the question.

MR. CONNORS: Now you know.

THE COURT: I did wonder, and I said, "Gee, is Mr. Connors ---"

MR. CONNORS: She is not in drag, Your Honor.

THE COURT: "Does he need a new set of eye glasses or something?"

At the close of all the parties' evidence in the trial court, Petitioner's counsel moved for an instructed verdict motion on the theory that the "his" mentioned earlier, that Petitioner is not a him, but a her (2R 152).

On July 9, 1993, the trial court found Petitioner is a "Female person" (Pet.App. 14) and denied Petitioner's acquittal request in her motion for a new trial after hearing and consideration of defense's memo of law (Pet.App. 13, 23 and 31; see 11-44). That motion sought a new trial and entry of an acquittal, for "The evidence is insufficient to support the judgment of conviction since ***** the State failed to prove the crime and all its elements as charged in the information in the above case" (Pet.App. 25, 28-29). That motion and its memo of law expressly addressed the federal due process issues raised herein (Pet.App. 26-28, 38, 41-44).

On December 22, 1994, the Texas Court of Appeals affirmed the judgment of the trial court (Pet.App. 1-6). During appeal to the Texas Court of Appeals, Petitioner raised nine points of error challenging the sufficiency of the evidence used in convicting Petitioner, for the State failed to correctly prove Petitioner's alleged gender "beyond a reasonable doubt." The Texas Court of Appeals found (Pet.App. 4): "... that the information's reference to 'his' includes the feminine gender, and therefore proof that appellant was a female is not at variance with the allegations in the information."

ISSUE IN BRIEF

A review of the opinion of the Texas Court of Appeals demonstrates the uncontradicted trial evidence is that Petitioner, a female, carried the handgun on and about her person (Pet.App. 2), not "on and about his person" (emphasis added) as the State's information had alleged (Pet.App. 7).

To fix that evidentiary insufficiency, the Court of Appeals said (Pet.App. 4):

> As the information is drawn in the words of the statute, we find that the information's reference to "his" includes the feminine gender, and therefore proof that appellant was a female is not at variance with the allegations in the information. There simply is no variance.

ARGUMENT

I. The trial court erred in convicting Petitioner as charged and the Court of Appeals erred in affirming that conviction which is not supported by "proof beyond a reasonable doubt."

The due process clause of the Fourteenth Amendment, as a matter of law, requires an acquittal for every defendant unless his or her state criminal conviction is supported by evidence that a rational factfinder could accept as sufficient to prove all the essential elements of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-1073, 25 L.Ed.2d 368 (1970); Hudson v. Louisiana, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781,

2789, 61 L.Ed.2d 560 (1979).

Appellate insufficiency review thus impinges upon a trial fact finder's "discretion only to the extent necessary to guarantee the fundamental protection of due process of law." Jackson, supra, 443 U.S. at 319, 99 S.Ct. at 2789. In a bench trial, the appellate court reviews evidentiary sufficiency against the State's charging instrument, which in Petitioner's case was the information (Pet.App. 7; 1R 2).

Petitioner was convicted under the statute, V.T.C.A. Penal Code §46.02(a), which reads in pertinent part, as follows:

> **A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.**

The information, under which Petitioner was charged and convicted, states (Pet.App. 7):

> IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:
>
> RICHARD R. RODRIGUEZ, Assistant Criminal District Attorney of Cameron County, Texas, on behalf of the State of Texas,

> presents in the COUNTY COURT AT LAW of Cameron County, Texas, at the NOVEMBER term, 1992, of said Court, that on or about the 17th day of SEPTEMBER, A.D. 1992, and before the making and filing of this information, in Cameron County, Texas, SYLVIA CARRANCHO CIMERMANCIC the Defendant, did then and there unlawfully, intentionally and knowingly carry on and about his person a weapon, to-wit: HANDGUN, against the peace and dignity of the State.

That "his person" allegation is descriptive of that which is statutorily and legally essential to charge the offense under the above Texas Penal Code provision. Therefore, the evidence failed to show Petitioner carried a handgun "on and about his person" as alleged because Petitioner is a female and not a male (Pet.App. 2 and 14).

With the conviction herein and its appellate affirmance, Petitioner has been denied safeguards guaranteed to her by due process of law—safeguards which are essential to the liberty of a government dedicated to justice under the law. Cole v. Arkansas, 333 U.S. 197, 201, 68 S.Ct. 514, 517, 92 L.Ed. 664 (1948).

Due process demands that a criminal conviction be based on sufficient evidence to prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he [the accused] is charged." In re Winship, supra, 397 U.S. at 364, 90 S.Ct. at 1073. The State was under an obligation to prove all the elements of the offense contained in the charging instrument, i.e., that Ms. Cimermancic carried a gun on or about "his person" (Pet.App. 7). Petitioner's conviction must therefore be reversed because contrary to the trial court's judgment (Pet.App. 8-11), the State failed to carry its burden to prove beyond a reasonable doubt its allegation that Petitioner carried a handgun on or about "his person" (Pet.App. 7).

The State was given sufficient opportunity to amend its charging instrument to read "her person" but failed to do so and therefore the State was bound by the four corners of its charging document. Such possession of a handgun would be unlawful only if it was "on or about

the person of the accused." By pleading the statutory phrase "his person" and not properly amending same before trial or conviction, the State was required to prove "his person" beyond a reasonable doubt. Since the State pled what could not anatomically or physically be proven beyond a reasonable doubt, a reversal must be ordered.

Applicable herein are this Court's following words in Thompson v. City of Louisville, supra, 362 U.S. at 204, 206, 80 S.Ct. 628-629 (footnotes omitted):

> Under the words of the ordinance itself, if the evidence fails to prove all three elements of that loitering charge, the conviction is not supported by evidence, in which event it does not comport with due process of law. The record is entirely lacking in evidence to support any of the charges.
>
> *****
>
> Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt.

ARGUMENT

II. The Texas Court of Appeals reversibly erred in applying legislative branch's rules of statutory construction to construe the State executive branch's grammar choice in the prosecutor's pleading.

The Texas Court of Appeals reversibly erred herein applying Texas Penal Code Section 1.05 and the Texas Code Construction Act not to construe legislation, namely section 46.02(a) of the Texas Penal Code, but to construe the State's pleadings in the criminal lawsuit against Petitioner. The Court of Appeals was mistaken. That Section 1.05 and Code Construction Act apply not to construction of parties' pleadings in lawsuits but only apply to the construction of the provisions of the Texas Penal Code and other legislation. The grammatical choices in the State executive branch's lawsuit pleadings are self-explanatory (Pet.App. 7).

A trial court can neither broaden the

State's charges through amendment nor permit a defendant to be tried on criminal charges that are not made in the charging instrument against him, Stirone v. U.S., 361 U.S. 212, 216-217, 80 S.Ct. 270, 272-273, 4 L.Ed.2d 252 (1960), for it is fatal error if the defendant was convicted on a charge the charging instrument never made against him or her. Id., 361 U.S. at 219, 80 S.Ct. 274.

For the Texas Court of Appeals to use the Code Construction Act to interpret and to ex post facto amend the State's informational pleadings amounted to a deprivation of Petitioner's right to due process under the Fourteenth Amendment. Stirone v. U.S., 361 U.S. 212, 219, 80 S.Ct. 270, 274, 4 L.Ed.2d 252 (1960).

Because the Texas Court of Appeals used the wrong interpretive tool on review, the "her" conviction affirmed by the Texas Court of Appeals, differs from the "his" offense Petitioner was charged with and convicted of by

the trial court. Such appellate review violates Petitioner's right to appellate due process under the Fourteenth Amendment. Dunn v. U.S., 442 U.S. 100, 106-107, 99 S.Ct. 2190, 2194, 60 L.Ed.2d 743 (1979).

Such unconstitutional affirmance is not justice under law. In Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948), the Court said:

> No principal of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised in that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, and cases there cited. If, as the State Supreme Court held, petitioners were charged with a violation of §1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. De Jonge v. State of Oregon, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278.

Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall. Frank v. Mangnum, 237 U.S. 309, 327, 35 S.Ct. 582, 587, 59 L.Ed. 969. Cf. Mooney v. Holohan, 294 U.S. 103, 113, 55 S.Ct. 340, 342, 79 L.Ed. 791, 98 A.L.R. 406. That court has not affirmed these convictions on the basis of the trial petitioners were afforded. The convictions were a violation of §2. Petitioners urged the State Supreme Court that the evidence was insufficient to support their conviction of a violation of §2. They also raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution. None of their contentions were passed upon by the State Supreme Court. It affirmed their conviction as though they had been tried and convicted of a violation of §1 when in truth they had been tried and convicted only of a violation of a single offense charged in §2, an offense which is distinctly and substantially different from the offense charged in §1. To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined at the trial court.

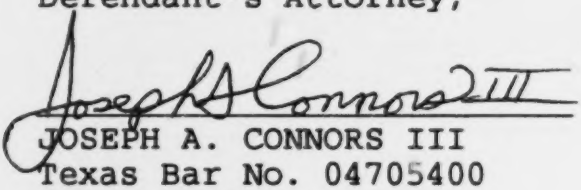
We are constrained to hold that petitioners have been denied safeguards guaranteed by due process of law—safeguards essential to the liberty in a government dedicated to justice under law.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to grant this petition for writ of certiorari, and remand this case to the Texas Court of Appeals with instructions to reverse Petitioner's judgment of conviction as an unconstitutional denial of due process guarantees.

Dated: June 30, 1995.

Respectfully submitted by
Defendant's Attorney,



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